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Supreme Court, U.S.
FILED
SEP 1 1995
CLERK

No. 95-119

In The
Supreme Court of the United States

October Term, 1995

CMK CONSTRUCTION, INC., *ET AL.*,
Petitioners,

v.

CARPENTERS' PENSION TRUST FUND – DETROIT AND VICINITY, *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

DAVID B. GUNSBERG
Counsel of Record
GUNSBERG AND BRESKIN, P.C.
Suite 200
1400 North Woodward Avenue
Bloomfield Hills, Michigan 48304
(810) 646-9090
Attorneys for Petitioners

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

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Petitioners respectfully request that this Court grant certiorari to require the district court and court of appeals to follow the NLRB determinations that are dispositive of the issues that were before the courts.[1] The NLRB determinations are reprinted at pp. 1-7 of the appendix to the petition.

Respondents' Brief in Opposition misstates Petitioners' argument and makes allegations which are belied by the record.

I.

THE COURTS SHOULD DEFER TO THE NLRB DECISIONS.

Petitioners are not arguing that the representational issues in this matter "had to be" resolved by the NLRB.

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1 None of the petitioners has a parent company or a subsidiary.

The NLRB and the district court had concurrent jurisdiction over this matter involving both the representational issue (whether the International Agreement covered the residential employee group) and the contractual issue (if the International Agreement did apply to the residential employee group, whether the employers were obligated under it to make fringe benefit contributions on behalf of the residential employees). However, the doctrine of *primary* jurisdiction holds that the NLRB, not the courts, decides *whether* there was a representational issue involved. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982).

Once the NLRB decided there was a representational issue, and then decided the representational issue (that the International Agreement does not cover the residential employees), the courts cannot find that there was not a representational issue, and the district court must follow the NLRB's decision on the representational issue. *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964); *McGuire* v. *Humble Oil and Refining Co.*, 355 F.2d 352 (2nd Cir. 1966); *Local 342* v. *Valley Engineers*, 975 F.2d 611 (9th Cir. 1992); *Smith Steelworkers* v. *A. O. Smith Corp.*, 420 F.2d 1 (7th Cir. 1969); *Local 204* v. *Iowa Electric Light and Power Co.*, 668 F.2d 413 (8th Cir. 1982); *Carpenters Local 1846* v. *Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982). As the Fifth Circuit stated in *Pratt-Farnsworth*, if the NLRB determination is not appealed, the court should accept the NLRB determination as conclusive; to allow a § 301 suit to challenge a prior NLRB decision allows a "second bite at the apple".

Respondents incorrectly state that the district court's rejection of the second NLRB charge filed in this matter was not raised by Petitioners before the Sixth Circuit (Brf. in Op., p. 14). In fact, Petitioners "submit[ted] that such refusal was erroneous", App. Brf., pp. 18-19, and referred to the charge throughout the appeal brief. See App. Brf., pp. 13, 14, 18-19. Petitioners also argued in the

brief "This Court is urged to find that the issues raised by Appellees below were preempted by the Board's finding that there was no representational rights, and no obligation to make Fund contributions under the International Agreement." App. Brf., p. 19.

Respondents also incorrectly state that the dismissed second charge was not included in the Joint Appendix to the Court of Appeals. However, the Joint Appendix Index includes "Defendant Trial Ex. 18 (Documents relating to NLRB *Cases*)" (emphasis added). Jt. App., p. iv. The second NLRB charge and the error of the district court's refusal to consider the charge were clearly raised before the Sixth Circuit, and are properly before this Court for review.

II.

IF A COLLECTIVE BARGAINING AGREEMENT CONTAINS A NO-STRIKE CLAUSE AS THE QUID-PRO-QUO, SUSPENSION OF THAT CLAUSE VOIDS THE ENTIRE CONTRACT.

Respondents also incorrectly state that Petitioners did not raise another issue, that the International Vice President stating the no-strike clause is inoperable meant that the International Agreement was inapplicable in its entirety, before the Court of Appeals. Petitioners raised this issue before the Court of Appeals; in their Appeal Brief, Petitioners quoted the International Vice President:

> Second, it is possible for an international signatory to *participate in negotiations for a Local Agreement in their home area while still holding the international agreement.* When this occurs, the no strike clause would not be in effect with respect to that area where the employer is engaged in local bargaining. (emphasis added).

App. Brf., p. 11. Petitioners then stated that MCCA President Doughty understood the International Vice

President's statement to mean that the International Agreement did not affect the residential employee group and its bargaining relationship with Petitioners, and again quoted the International Vice President:

> While your local negotiations were going on, the no strike clause of the International Agreement would not be in effect for MCCA members on residential work within Local 1234's territorial area.

App. Brf., p. 12. Petitioners also argued that both parties understood the letters regarding the no-strike clause to mean that the Union did not intend for the International Agreement to apply to residential/local negotiations, especially since the International Vice President (Souter) did not testify at the trial.[2] *Id.* Petitioners clearly raised the issue of the International Vice President's reference to the no-strike clause meaning the International Agreement did not apply to the residential employees to the court of appeals, and the issue is properly before this Court for review.

Petitioners are not arguing that all collective bargaining agreements must contain a no-strike clause, as Respondents state. Petitioners are stating that when a contract contains a no-strike clause as the quid pro quo, the entire contract is void if the no-strike clause is suspended. The letters of the International Vice President do not make sense in any other context. *It is nonsensical to state that the right to bargain over local conditions is preserved while at the same time stating that the International Agreement applies to local negotiations.* Petitioners understood that they retained their

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[2] Specifically, Doughty testified that the International Agreement would not affect local negotiations, and at no time did the International Union lead the employers to believe that the employers could be bound by a residential contract in their local area that they themselves had not negotiated and signed (TR, 123-124, App. Brf., p. 12).

right to bargain over residential (local) terms and conditions notwithstanding the existence of the International Agreement covering commercial work, as confirmed by the International Vice President both before and during the local negotiations.

The NLRB understood the unique relationship between the parties and the nonsensical result of the International Agreement applying to the residential (local) employee group when the Union had assured the employers they would retain their right to bargain over residential (local) terms and conditions of employment; Respondents should not be allowed to challenge the NLRB determination via a § 301 action.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition for Writ of Certiorari, this Court should grant a writ of certiorari to the Court of Appeals for the Sixth Circuit to review its decision in this case and reinforce the principle of courts following the NLRB's expertise when the NLRB has made a decision which impacts the issues in a § 301 action.

Respectfully submitted,

GUNSBERG AND BRESKIN, P.C.

By: /s/ DAVID B. GUNSBERG (P24235)
Counsel of Record

1400 N. Woodward Avenue, Suite 200
Bloomfield Hills, Michigan 48304
Attorneys for Petitioners

Dated: August 30, 1995